

MOH CHUAN PIN

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v.

PP

FEDERAL COURT, PUTRAJAYA

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ZAKI TUN AZMI CJ

ALAUDDIN MOHD SHERIFF PCA

GOPAL SRI RAM FCJ

[CRIMINAL APPEAL NO: 05-39-2008(R)]

16 JULY 2009

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CRIMINAL LAW: Penal Code - Section 300 - Murder - Appeal against conviction and sentence to death - Inadmissible statement by appellant - Whether there must be express direction by court to itself to exclude statement - Assessment of evidence - Defence's case - Flight of accused - Other relevant circumstances - Inference of guilt

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CRIMINAL PROCEDURE: Statements - Inadmissible statement - Whether there must be express direction by court to itself to exclude statement - Whether court's decision arrived at uninfluenced by anything contained in inadmissible statement

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CRIMINAL PROCEDURE: Appeal - Decision of trial judge - Murder - Assessment of evidence - Defence's case - Flight of accused - Other relevant circumstances - Inference of guilt

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EVIDENCE: Statement - Inadmissible statement - Whether there must be express direction by court to itself to exclude statement - Whether court's decision arrived at uninfluenced by anything contained in inadmissible statement

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EVIDENCE: Appeal - Decision of trial judge - Murder - Assessment of evidence - Defence's case - Flight of accused - Other relevant circumstances - Inference of guilt

The appellant was tried and convicted by the High Court for the offence of murder and sentenced to death. His appeal to the Court of Appeal was dismissed, resulting in the present appeal. The appellant submitted that it was incumbent for the trial judge to have expressly made it clear in his judgment that he had put the appellant's previous statement, which the judge had found to be inadmissible, out of his mind when considering the defence, which did not happen here. Hence, the judgment was flawed and

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- A the appellant's conviction rendered unsafe. It was averred that the judge in the present case ought to have administered unto himself the kind of direction that was used by Shankar J in *PP v. Jamali Adnan*. The appellant further contended that the judge fell into error with regard to the assessment of the evidence because he
- B had failed to judicially appreciate the defence's case. The argument here was that there was a space of time between the departure of PW8 and the arrival of PW10 and according to the defence presented, it was during this interval that some other person entered the premises and committed the crime. The appellant had
- C gone to use the toilet when this happened and when he returned, he saw what had happened to the deceased and tried to help her. Hence, the bloodstains on his person. Furthermore, the judge was quite wrong in relying on evidence of flight by the appellant since there were many cases that have held that the mere act of an
- D accused person absconding from the scene was not consistent with guilt. It was evidence of neutral value as an innocent person may flee in panic.

Held (dismissing the appeal, and affirming the conviction and sentence)

- E **Per Gopal Sri Ram FCJ delivering the judgment of the court:**

- (1) There was nothing in the judgment of the trial judge that carried even a hint of his having relied on or indeed even referred to any part of the previous inconsistent statement. It followed that the trial judge's decision was arrived at uninfluenced by anything contained in the statement held inadmissible. *Jamali Adnan* was of no assistance to the appellant. In that case what happened was that patently inadmissible evidence had been adduced during the defence's case. Shankar J correctly notified counsel that the evidence could not be stricken from the record but assured them that any evidence which was inadmissible would be excluded from his consideration. Nothing of that sort happened in this instance. What happened here was that an impeachment proceeding along the lines as prescribed by Taylor J in *Muthusamy v. PP* was followed to the letter. Having held the statement inadmissible, the judge went on with the case.
- I There was nothing in *Muthusamy* requiring a court that has read the statement to expressly direct itself that it excludes from its mind any part of the statement tendered in the

impeachment process. This appeared to fortify the way in which the judge approached the assessment of the evidence in the present case. To reiterate, this was not a case in which inadmissible evidence had been adduced. Had that been the case, then perhaps the appellant's complaint may have had some substance. As matters stood it had none. *Muthusamy v. PP* (foll); *PP v. Jamali Adnan* (dist). (para 5)

- (2) In his carefully considered judgment, the judge directed his mind to the defence's case and gave cogent reasons for rejecting it. It must be said in fairness to the trial judge that his assessment of the evidence accorded with the probabilities of the case. It was in evidence that there was no door to the shop in question save for that from which the appellant emerged. If the assailant had been some other person, PW11 would have seen him emerge from the shop in question. However, the appellant was the only person to emerge from the shop; the story of another assailant, therefore, did not ring true. As for the evidence of the appellant's flight, it was quite true that there were cases in which the courts have said that mere evidence of flight was equivocal. But in all those cases, evidence of flight by the accused was the only circumstance relied upon by the prosecution to bring home the charge. That was not the case here as there was other evidence that was consistent with the appellant's guilt. And there were cases in which the courts have relied on evidence of flight taken together with other relevant circumstances to draw an inference of guilt. In short, the conduct of the instant appellant in all the circumstances of the case strongly supported the conclusion that none other than he was the assailant who took the deceased's life. *Ryan v. Jarvis* (refd); *PP v. Mohd Bandar Shah Nordin* (refd). (paras 7 & 8)

Bahasa Malaysia Translation Of Headnotes

Perayu telah dibicara dan disabit oleh Mahkamah Tinggi atas kesalahan membunuh dan telah dihukum mati. Rayuan beliau ke Mahkamah Rayuan telah ditolak, mengakibatkan rayuan semasa. Perayu menghujah bahawa ia adalah wajib untuk hakim perbicaraan menyatakan dengan jelas dalam penghakimannya bahawa beliau mengetepikan pernyataan dahulu perayu, yang hakim telah mendapati sebagai tidak boleh diterima, apabila menimbangkan pembelaan, yang tidak berlaku di sini. Oleh itu,

- A penghakiman adalah cacat dan sabitan perayu telah menjadi tidak selamat. Ia telah dihujah bahawa hakim dalam kes semasa sepatutnya melaksanakan atas dirinya arahan seperti yang digunakan oleh Shankar H dalam *PP v. Jamali Adnan*. Perayu lagi mendakwa bahawa hakim telah khilaf berhubung dengan penilaian
- B keterangan kerana beliau telah gagal menimbangkan kes pembelaan secara kehakiman. Penghujahan di sini adalah bahawa terdapat jangka masa di antara pemergian PW8 dan ketibaan PW10 dan mengikut pembelaan yang dikemukakan, ia merupakan semasa jarak waktu itu bahawa orang lain telah memasuki premis itu dan
- C melakukan jenayah itu. Perayu telah pergi ke tandas apabila ini berlaku dan apabila beliau kembali, beliau telah nampak apa yang berlaku kepada si mati dan telah cuba menolongnya. Oleh yang demikian, adanya kesan-kesan darah atas badannya. Tambahan lagi, hakim telah khilaf apabila bergantung pada keterangan
- D perlarian oleh perayu kerana ada banyak kes-kes yang telah mendapati bahawa tindakan seseorang tertuduh hanya melarikan diri dari tempat kejadian adalah tidak konsisten dengan kebersalahan. Ia merupakan keterangan bernilai neutral kerana seorang yang tidak bersalah mungkin lari kerana telah panik.
- E **Diputuskan (menolak rayuan, dan mengesahkan sabitan dan hukuman)**
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:
- F (1) Tiada apa-apa dalam penghakiman hakim perbicaraan yang menunjukkan bahawa beliau telah bergantung atau merujuk kepada apa-apa bahagian pernyataan dahulu yang tidak
- G konsisten itu. Ini bermakna bahawa keputusan hakim perbicaraan telah didapati tanpa dipengaruhi oleh apa-apa yang dikandungi dalam pernyataan yang diputuskan tidak boleh diterima itu. *Jamali Adnan* tidak membantu perayu dalam apa-apa cara. Dalam kes itu apa yang berlaku ialah keterangan yang jelas tidak boleh diterima telah dikemukakan semasa kes
- H pembelaan. Shankar H memberitahu peguam bahawa keterangan tidak boleh dipotong dari rekod tetapi menjamin mereka bahawa apa-apa keterangan yang tidak boleh diterima tidak akan dimasukkan dalam pertimbangannya. Tiada apa-apa seperti itu yang terjadi dalam kes ini. Apa yang berlaku di sini
- I ialah suatu prosiding pencabaran mengikut lebih kurang apa yang ditetapkan oleh Taylor H dalam *Muthusamy v. PP* telah diikuti dengan betul-betul. Setelah mendapati pernyataan itu

tidak boleh diterima, hakim meneruskan dengan kes. Tidak ada apa-apa dalam *Muthusamy* yang memerlukan mahkamah yang telah membaca pernyataan itu untuk mengarahkan dirinya secara nyata bahawa ia menyingkir dari mindanya apa-apa bahagian pernyataan yang telah dikemukakan dalam prosiding pencabaran itu. Ini nampaknya memperkuat cara bagaimana hakim mengendalikan penilaian keterangan dalam kes semasa. Untuk mengulang, ini bukan satu kes di mana keterangan yang tidak boleh diterima telah dikemukakan. Jikalau ia merupakan sebegitu, aduan perayu mungkin mempunyai sedikit substans. Memandangkan kedudukannya, ia tiada substans. *Muthusamy v. PP* (diikuti); *PP v. Jamali Adnan* (dibezakan).

- (2) Dalam penghakimannya yang ditimbangkan dengan teliti, hakim telah mengarahkan mindanya kepada kes pembelaan dan telah memberi sebab-sebab yang meyakinkan bagi penolakannya. Ia mesti dikatakan, untuk berlaku adil kepada hakim perbicaraan, bahawa penilaian keterangan olehnya selaras dengan kebarangkalian kes ini. Ia dalam keterangan bahawa tidak ada pintu pada kedai tersebut kecuali pintu dari mana perayu telah keluar. Jika penyerang adalah orang lain, PW11 akan melihatnya keluar dari kedai tersebut. Walau bagaimanapun, perayu merupakan orang tunggal yang keluar dari kedai itu; cerita tentang seorang penyerang lain, oleh itu, tidak mungkin benar. Berhubung dengan pelarian perayu, ia memang benar bahawa terdapat kes-kes di mana mahkamah telah mengatakan bahawa keterangan pelarian sahaja adalah taksa. Tetapi dalam kesemua kes-kes itu, keterangan pelarian oleh tertuduh merupakan keadaan tunggal yang diharapkan oleh pendakwaan untuk membuktikan tuduhan itu. Itu bukannya kes di sini kerana ada keterangan lain yang konsisten dengan kebersalahan perayu. Dan ada kes-kes di mana mahkamah bergantung kepada keterangan pelarian bergabung bersama-sama dengan keadaan-keadaan relevan yang lain untuk membuat suatu inferens kebersalahan. Pendeknya, kelakuan perayu semasa dalam semua keadaan-keadaan kes ini menyokong dengan kuat kesimpulan bahawa tiada orang selain dari beliau yang merupakan penyerang yang telah membunuh si mati. *Ryan v. Jarvis* (dirujuk); *PP v. Mohd Bandar Shah Nordin* (dirujuk).

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A Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC (**refd**)

Muthusamy v. PP [1948] MLJ 57 (**fol**)

Nayeb Sahana v. Emperor AIR [1934] Cal 636 (**refd**)

PP v. Jamali Adnan [1985] 1 CLJ 196; [1985] CLJ (Rep) 656 HC (**dist**)

B *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859 CA (**refd**)
Ryan v. Jarvis [2005] UKPC 27 (**refd**)

For the appellant - Karpal Singh (Jagdeep Singh Deo & RSN Rayer with him); M/s Karpal Singh & Co

For the respondent - Saiful Edris Zainuddin DPP; AG's Chambers

C [*Appeal from Court of Appeal, Criminal Appeal No: R-05-36-2003*]

[*Editor's note: For the Court of Appeal judgment, please see Moh Chuan Pin v. PP* [2009] 5 CLJ 426.]

D *Reported by Suresh Nathan***JUDGMENT****E Gopal Sri Ram FCJ:**

F [1] The appellant was tried and convicted by the High Court at Kangar for the offence of murder and the mandatory death penalty was passed upon him. His appeal to the Court of Appeal was dismissed. He has now appealed to us. The facts relevant to this appeal are as follows.

G [2] PW13 (Lai Chwing Churn) runs a shop in Kangar. It is called Kedai Sri Mega Communication. It sells cell phones and other telecommunication equipment. Nor Ayanti (the deceased) was employed there. PW13's father (PW8) also assisted in the running of the business. On 30 April 2001, at about 2.30pm, PW8 came to the shop. He saw three persons there. They were the deceased, PW9 and the appellant. Shortly thereafter PW9 left. After a brief conversation with the appellant, PW8 left the premises. At about 3pm, PW10 who was working in the shop next to PW13's heard the muffled sound of a lady screaming. He ran next door and tried to enter but found the door locked. He saw someone crouching behind the door. He asked his friend PW11 to watch whether anyone emerged from PW13's shop while he went off to get some assistance. PW11 then saw the appellant run out of the shop in question with blood dripping from his left

hand. The appellant entered PW9's motorcycle shop and kept on running. He was pursued by PW9 and PW12 (PW9's colleague). PW9 noticed that blood was dripping from the appellant. The appellant sprang into a river, emerged and continued to flee, pushing aside PW12 who tried to apprehend him. Eventually the appellant was apprehended by PW15. The deceased who was initially alive though injured, succumbed to her injuries and died in hospital.

[3] Acting on these facts, the High Court directed the appellant to enter upon his defence. The appellant did so and elected to give evidence on oath. During his evidence, the prosecution sought to impeach his credit, relying upon a written statement made by the appellant to the police in the course of investigations. The relevant parts of the statement that were said to contain the contradictions relied upon were marked and handed up to the judge who, after perusing the relevant parts found material contradictions. However, after a *voir dire*, he held the statement inadmissible as having been made involuntarily and on that ground declined to proceed with the impeachment. In this he was entirely correct as a witness cannot be cross examined or impeached upon an involuntary statement. See, *Nayeb Sahana v. Emperor* AIR [1934] Cal 636.

[4] Before us, a submission was made that it was incumbent in these circumstances for the learned judge to have expressly made it clear in his judgement that he had put the appellant's previous statement out of his mind when considering the defence. That did not happen here. Hence the judgment is flawed and the conviction of the appellant rendered unsafe. In support of this argument reliance was placed on *Public Prosecutor v. Jamali Adnan* [1985] 1 CLJ 196; [1985] CLJ (Rep) 656 and the following passage from the judgment of Shankar J (later JCA) was read to us:

After the Defence was called and the Accused commenced to give evidence on oath he proceeded to give a detailed account of the questions which were put to him during the interrogation and the answers which he gave. This evidence was designed to establish that at no time did he tell the police that he had firearms or ammunition or that he would lead the police to the place where he buried them. Matters were sought to be brought out as to other friends of the Accused, and his relationship with Pie-ie, and his previous visits, and so on and so forth. It was at this point

- A that the court in its anxiety to ensure that inadmissible evidence did not go in by default, invited the close attention of both the Defence Counsel and the learned Deputy Public Prosecutor to the provisions of section 113 of the Criminal Procedure Code and its impact on section 27 of the Evidence Act. Clearly no caution had
- B been administered to the Accused after his arrest and Defence Counsel then suggested that the inadmissible answers should be struck from the record. I notified the parties that this could not be done but that any evidence which was inadmissible would be excluded from my consideration.
- C [5] It was submitted that the learned judge in the present case ought to have administered unto himself the kind of direction that Shankar J did in the passage above quoted. With respect, we do not find any justification in the complaint made. In the first place,
- D there is nothing in the judgment of the trial judge that carries even a hint of his having relied or indeed even referred to any part of the previous inconsistent statement. It follows that the decision of the trial judge was arrived at uninfluenced by anything contained in the statement held inadmissible. In the second place, we find Jamali bin Adnan to be of no assistance to the appellant. In that
- E case what happened was that patently inadmissible evidence had been adduced during the defence case. Shankar J drew attention of this to counsel on both sides. When he did so, counsel applied to have the inadmissible evidence stricken from the record. That very learned judge then correctly notified counsel that that could
- F not be done but assured them that “any evidence which was inadmissible would be excluded from my consideration.” Nothing of that sort happened here. What happened here is that an impeachment proceeding along the lines as prescribed by Taylor J in *Muthusamy v. Public Prosecutor* [1948] MLJ 57 was followed to
- G the letter. Having held the statement inadmissible, the judge went on with the case. Now, if you look at the judgment in *Muthusamy* carefully enough you will find that impeachment procedure requires the court to read the statement. If it finds no material contradiction, it is to hand the statement back. There is nothing
- H in *Muthusamy* that requires a court that has read the statement to expressly direct itself that it excludes from its mind any part of the statement tendered in the impeachment process. This appears to fortify the way in which the judge approached the assessment of the evidence in the present case. To reiterate, this is not a
- I case in which inadmissible evidence had been adduced. Had that been the case, then perhaps the appellant’s complaint may have had some substance. As matters stand it has none.

[6] We next turn to the complaint regarding the assessment of the evidence. It was submitted that the learned judge fell into error in this department because he failed to judicially appreciate the defence case. The argument here is that there was a space of time between PW8's departure and PW10's arrival. According to the defence presented, it was during this interval that some other person entered the premises and committed the crime. The appellant had gone to use the toilet when this happened. When he returned, he saw what had happened to the deceased and tried to help her. Hence the bloodstains on his person. Further, the judge was quite wrong in relying on evidence of flight by the appellant as there are many cases that have held that mere flight, that is to say, the mere act of an accused person absconding from the scene is not consistent with guilt. It is evidence of neutral value as an innocent person may flee in panic. So much for the appellant's case before us.

[7] With respect we are unable to accept the arguments raised. There are two reasons for this. First, the weight to be given to the evidence of witnesses, including the appellant was a matter very much for the trial judge to determine. His view on credibility is very much a question of fact. That view was affirmed by the Court of Appeal. It is only in rare cases that this court will interfere with concurrent findings of fact based on the credibility of witnesses. It will certainly do so where a miscarriage of justice has been occasioned for any reason, including a failure on the part of the trial court to judicially appreciate the totality of the evidence presented. With respect this is not such a case. In his carefully considered judgment, the learned judge directed his mind to the defence case and gave cogent reasons for rejecting it. It must be said in fairness to the learned trial judge that his assessment of the evidence accords with the probabilities of the case. It is in evidence that there was no door to the shop in question save for that from which the appellant emerged. If the assailant had been some other person, PW11 would have seen him emerge from the shop in question. However, the appellant was the only person to emerge from the shop. The story of another assailant does not therefore ring true. And as Lord Hoffmann said in *Ryan v. Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda:

- A It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.
- B [8] As for the evidence of the appellant's flight it is quite true that there are cases in which the courts have said that mere evidence of flight is equivocal. See, for example, *Abdullah Zawawi Yusoff v. Public Prosecutor* [1993] 4 CLJ 1. But if you look carefully enough at all those cases, in each of them evidence of flight by
- C the accused was the only circumstance relied upon by the prosecution to bring home the charge. That is not the case here. For, there is other evidence that is consistent with the guilt of the appellant. And there are cases in which the courts have relied on evidence of flight taken together with other relevant circumstances
- D to draw an inference of guilt. See, *Public Prosecutor v. Mohd Bandar Shah Nordin* [2008] 4 CLJ 859. In short, the conduct of the instant appellant in all the circumstances of the case strongly supports the conclusion that none other than he was the assailant who took the deceased's life.
- E [9] We have read and re-read the record of appeal and the judgments of the High Court and of the Court of Appeal but are unable to discover any material upon which it could be concluded that the appellant's conviction is unsafe.
- F [10] In the circumstances, we have no alternative but to dismiss the appeal and to affirm the conviction and sentence.

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